Yek Nik Poh v Public Prosecutor

HIGH COURT (BINTULU) — CRIMINAL APPEAL NO 41–06 OF 2008
SANGAU GUNTING J
4 MAY 2012

Criminal Procedure — Charge — Amendment — Whether court should accede to prosecution's request to amend charge — Whether sufficient material existed before court to exercise discretion under s 325 of the Criminal Procedure Code — Whether amendment of charge would deny accused of existing defence

The appellant was convicted and sentenced by a lower court on a charge under s 411 of the Penal Code of dishonestly retaining a stolen car. In his instant appeal to the High Court against conviction and sentence, the appellant pointed out that the engine and chassis numbers of the vehicle as stated in the charge differed from that given by the complainant in the case both in his police report and in his testimony in court. His description of the colour of the car in his testimony also differed from what he had stated in his police report. The only common factor in the charge, the police report and the complainant's testimony was the registration number of the vehicle which was given as QTB 9379. In his defence the appellant testified that the registration number of the car he was driving when he was stopped by police was KD 3409Q and that he did not know that that car was stolen as it belonged to someone else. At the trial the prosecution did not produce the stolen vehicle's registration card nor did it establish who owned the vehicle. Given the several contradictions and gaps in the prosecution's evidence, for which the prosecution offered no explanation, the respondent at the appeal hearing conceded that the appeal should be allowed. The respondent, however, requested the court to amend the charge to one under s 108(f) of the Road Transport Act 1987 in view of the fact the car the appellant was driving at the time he was apprehended had the registration No KD 3409Q.

Held, allowing the appeal:

(1) Based on the appellant's submission and the respondent's concession, the appellant's conviction was quashed and the sentence set aside (see para 14).

(2) The court could not accede to the respondent's request to amend the charge as the materials for the court to exercise its discretion under s 325 of the Criminal Procedure Code had not been sufficiently put before the court. This was especially so having regard to the overall defence of the appellant. To amend the charge and expect the appellant to thereafter

plead guilty to it was practically tantamount to asking the appellant to abandon substantially his line of defence (see paras 13 & 19).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum oleh mahkamah rendah atas pertuduhan di bawah s 411 Kanun Keseksaan terhadap dengan tidak jujur menyimpan kereta curi. Dalam rayuannya ini kepada Mahkamah Tinggi terhadap sabitan dan hukuman, perayu menegaskan bahawa enjin dan nombor cesi kenderaan seperti yang dinyatakan di dalam tuduhan berbeza daripada yang diberikan oleh pengadu dalam kes dalam laporan polisnya dan dalam keterangannya di mahkamah. Penerangannya mengenai warna kereta dalam keterangannya juga berbeza daripada apa yang dinyatakannya di dalam laporan polis. Satu-satu fakta biasa dalam tuduhan, laporan polis dan keterangan pengadu adalah nombor pendaftaran kenderaan yang diberikan sebagai QTB 9379. Dalam pembelaannya perayu memeberi keterangan bahawa nombor pendaftaran kereta yang dipandunya apabila dia diberhentikan oleh polis adalah KD 3409Q dan dia tidak tahu bahawa kereta tersebut dicuri kerana ia dimiliki oleh orang lain. Pada perbicaraan pihak pendakwaan tidak mengemukakan kad pendaftaran kereta yang dicuri dan juga ia tidak membuktikan siapa tuan punya kenderaan tersebut. Dengan terdapatnya beberapa percanggahan dan jurang dalam keterangan pihak pendakwaan, yang mana pihak pendakwaan tidak menawarkan apa-apa penjelasan, responden pada pendengaran rayuan bersetuju bahawa rayuan patut dibenarkan. Responden, walau bagaimanapun, memohon mahkamah meminda tuduhan kepada satu di bawah s 108(f) Akta Pengangkutan Jalan 1987 mengambil kira fakta kereta yang mana perayu memandu pada masa dia ditahan mempunyai nombor pendaftaran KD 3409Q.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan peghujahan perayu dan konsesi responden, sabitan perayu dibatalkan dan hukuman diketepikan (lihat perenggan 14).

(2) Mahkamah tidak dapat bersetuju kepada permohanan responden untuk meminda tuduhan kerana material-material untuk mahkamah menjalankan budi bicaranya di bawah s 325 Kanun Tatacara Jenayah tidak dikemukakan secukupnya di hadapan mahkamah. Ini terutamanya mengambil kira keseluruhan pembelaan perayu. Untuk meminda tuduhan dan menjangka perayu kemudiannya memplid bersalah kepadanya adalah secara praktikal merupakan meminta perayu meninggalkan sebahagian besar bukti pembelaannya (lihat perenggan 13 & 19).]

Notes

For cases on amendment, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1208–1224.

Legislation referred to

Criminal Procedure Code ss 158, 325
Evidence Act 1950 s 114(g)
Penal Code s 411
Road Transport Act 1987 s 108, 108(f)

Jacob Wong (Nawi & Co Advocates) for the appellant.
Fadzillah Begum (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Sangau Gunting J:

[1] The appellant was charged under s 411 of the Penal Code ie '… dishonestly retaining one unit Proton Iswara bearing registration plate number QTB9379, engine number 4G15P-HG0498 and chassis number PL1C22SKR1B538922 …'.

[2] Upon discovering that the motorcar QTB 9379 was missing the manager of Syarikat Kwong Hin Motor Company ('PW1') lodged a police report (exh P1). Concerning the description of the car in question, learned counsel for the appellant, inter alia, raised the difference between the description thereof by the complainant (PW1) in his police report and his corresponding description of the car reported missing.

[3] In his police report (exh P1), the Proton Iswara car's colour was described as 'hijau metalik', and the registration number, engine number and chassis number were stated as QTB9379, 4G15P-HG0498, and PLK22SKR1B538922 respectively (Emphasis added.) The appellant's counsel points out, that in his testimony PW1 described the car's colour as silver and stated the engine number and chassis number to be 4G15V-HG0498 and PLC22SKR1B638922 respectively (Emphasis added.) The charge preferred against the appellant states the Proton Iswara car's registration number as QTB9379, and the engine and chassis numbers are stated respectively as 4G15P-HG0498 AND PL1C22SKR1B538922.

[4] The appellant argued that, presumably notwithstanding PW1's purported identification of the seized car, due to the aforesaid differences in the description concerning the colour and the chassis and engine numbers, the car recovered could be totally different from the car reported missing by PW1. More specifically, the appellant's counsel contended: 'There is a major discrepancy between the police report No. 5833/2004 lodged by PW1 … (Ex. P.1) and his (PW1's) oral testimony as to the descriptions of the vehicle (Ex.P.2) was (sic) a material fact for the court to consider, yet the prosecution offered no

explanation. Had the prosecution tendered the vehicle registration card as exhibit to verify the true identity of the car, the court could have come to a correct decision'.

[5] The appellant also contends that aside from merely stating that the car QTB9379 belongs to Syarikat Kwong Hin Motor Company, the prosecution had not established the ownership thereof. In this connection, it was pointed out that the vehicle's registration card was never tendered in court, and that no authorised road transport department officer was called to testify to prove the subject matter of the charge. The appellant's counsel says, the failure to tender the registration card was never explained, and such failure to tender 'surely would attract the adverse inference that if tendered it would not be favorable to the prosecution'. Implicit in the appellant's argument seems to be, that such circumstances should justify the invocation of s 114(g) of the Evidence Act.

[6] Still on the ingredient of the offence as per charge — that the vehicle was stolen property, the appellant also contends there is 'a gap in the prosecution case as to the true identity of the exhibit'. The reason given by the appellant's counsel relates to the non-calling of one 'Kpl. Micheal' concerning the handing over of, inter alia, the seized vehicle to the investigating officer ('PW6').

[7] The appellant during his testimony had told the court he did not know the car KD3409Q he was driving when he was stopped by the police was a stolen vehicle. In relation thereto, he had testified, inter alia, that one Bujang ak Lajo had asked him to keep the vehicle. PW3 (L/Kpl Hssim bin Awi) testified the appellant did tell him the car belongs to someone else, but he forgot the name. Learned counsel for the appellant says, the investigating officer (PW6), having not investigated 'as to the ownership of the vehicle bearing registration no. KD3409Q', the question arises 'was this vehicle KD3409Q, a stolen vehicle?'

[8] More specifically, the appellant's counsel submits: 'Was this vehicle KD3409Q actually belongs to the vehicle which the accused was found in possession? The prosecution had not establish this fact bearing in mind that the offence with which the appellant was charge is - dishonestly retained stolen property, to wit, a Proton Iswara bearing registration No. QTB9379, engine No.4G15P-HG0498 and chassis No. PL1C22SKR1B538922 which is not the vhicle that was reported stolen by PW1 as stated in his police report.' The corresponding descriptions given in PW1's police report (P1) have been mentioned earlier.

[9] The substance of the appellant's contention concerning the issue of culpability or otherwise of the appellant/accused seems indicated by the following submission: '… there is so much of major contradictions between

the oral evidence of the witnesses and the police report. The prosecution had never made any effort to explain the contradictions but choose to leave it to the court to guess what is supposed to be the correct descriptions. Had the prosecution prove the vehicle QTB 9379 belongs to Kwong Hin Motor, the registered owner? Was the vehicle KD3409Q found in the possession of the appellant a stolen vehicle? My Lord, all questions are unanswered. There are so many gaps in the prosecution's case which is the duty of the prosecution to fill up ….'

[10] With respect, based on the appellant's arguments on the issues relating to the alleged contradictions and gaps in the prosecution case, it would appear justified that the appeal ought to be allowed. In any case, learned senior federal counsel conceded on the culpability issue as would be discussed below.

[11] Despite of both parties having been given ample time to prepare written submissions, only learned counsel for the appellant prepared one, while it would appear learned senior federal counsel ('SFC') chose not to prepare any written submission. Perhaps, the learned SFC thought it was unnecessary in view of her stand as regards the appeal of the appellant/accused: that she would concede that the appeal be allowed. So during the time fixed for clarification and/or decision she specifically told the court: 'I concede that the appeal be allowed.'

[12] At the same time, however, she requested that the court 'invoke the power under s 325 of the Criminal Procedure Code to amend the charge under s 158 of the Criminal Procedure Code'. Here is how the learned SFC tried to portray what she had in mind: 'The concession is that in the circumstances of this (sic) the learned Magistrate ought to have amended the charge (sic) s 108 of the Road Transport Act 1987. Where in this cases (sic) it is clearly, based on the evidences the Road Tax disc and the Registration no. of the car when the appellant was apprehended was KD3409Q. Based on this the charge should be amended accordingly which unfortunately was not done by the learned magistrate'.

[13] Although learned counsel for the appellant did not object to the learned SFC's request for the charge to be amended to one under s 108(f) of the Road Transport Act 1987 ('RTA'), the court nevertheless did not accede to the amendment request. The court told the parties: 'With respect, it appears that the materials, if any, for this court to exercise its discretion as suggested by the learned SFC under s 325 have not been sufficiently put before the court. This is especially so having regards to the overall defense of the appellant in this case. As such it would be very difficult for this court to accede to the learned SFC's application, notwithstanding the non-objection of learned counsel for the appellant'.

[14] Thereafter, the court allowed the appeal based on the submission of learned counsel for the appellant and the concession of the learned SFC, and accordingly the conviction was quashed and the sentence was set aside. The court also told the parties, 'What the prosecution would do hereinafter is, of course, entirely up to them'. That ought to have given quite clearly, an indication to the effect, that it was nevertheless open to the prosecution to exercise their discretion to, thereafter, prefer a charge against the appellant under s 108(f) of the Road Transport Act 1987 as contemplated by the learned SFC.

[15] Concerning the court's disallowing the said request of the learned SFC, it would appear pertinent to note, that, as could be gleaned from the notes of proceedings relating to the hearing of the appeal, the entirely oral submission of the learned SFC concerning the justifiability or otherwise of the invocation of s 325 of the Criminal Procedure Code, and thereafter to amend the charge to one under s 108 of the Road Transport Act 1987, is at best, sketchy.

[16] To recap, what the learned SFC told the court was this: 'Where in this cases (sic) it is clearly, based on the evidences, the Road Tax disc and the Registration no. of the car when the appellant was apprehended was KD3409Q. Based on this the charge should be amended accordingly which unfortunately was not done by the learned Magistrate'. With respect, to begin with, the aforesaid portrayal by the learned SFC presumably of why the court ought to accede to her amendment request, does not evoke sufficient clarity and proper perspective having regards the overall facts and circumstances, including and particularly the defendant's line of defense as raised by his advocate.

[17] More seriously however is this: that to amend the charge and expect the defendant to thereafter plead guilty to it would appear practically tantamount to asking the defendant to abandon substantially his line of defence earlier on referred to. It is to be noted that consistent with the said line of defence, and consistent with the defence consequential to the various contradictions and/or inconsistencies in the testimonies of the prosecution witnesses, including and particularly PW1, and in view of, inter alia, the non-tendering of the relevant registration card, the defence contention that the 'vehicle KD3409Q' could possibly belong to 'the vehicle which the accused was found in possession' would appear tenable.

[18] It was basically in the aforesaid circumstances and for all the aforesaid reasons that this court arrived at the decision as it did.

Appeal allowed.

Reported by Ashok Kumar